



September 20, 2010

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VIA ECF

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

Re: Proceeding WT 08-7

Dear Ms. Dortch:

This ex parte letter addresses two recent events by T-Mobile USA, Inc. ("T-Mobile") that underscore the need for Commission guidance on wireless carrier control over text messages. T-Mobile is blocking text messages from its customers based on content, and discriminating against certain customers with additional, uncalled for fees that are not being levied against other select customers. Both practices go against long-standing rules that preclude common carriers like T-Mobile from engaging in call blocking and customer discrimination.

The first incident involves T-Mobile unilaterally and unlawfully blocking text messages to and from its customers based on content. On September 10, 2010 T-Mobile began to block the short code of Club Texting, Inc. d/b/a EZ Texting, Inc. ("EZ Texting"). T-Mobile's customers were no longer able to contact the businesses and non-profits that use EZ Texting's short code (313131) and vice versa. EZ Texting's customers include churches, non-profits, companies, and, until recently, a website that provides information on the location of legal medical marijuana dispensaries in states where medical marijuana is legal (the "website"). The website had been using EZ Texting's short code since June 2009 without complaint from any wireless carrier or mobile phone user. Before T-Mobile began blocking EZ Texting's customers, EZ Texting had heard through industry contacts that unidentified wireless carriers found EZ Texting's association with the website inappropriate and would block EZ Texting's short code. In order to save its business from blocking by the wireless carriers, EZ Texting immediately had the website remove EZ Texting's short code and EZ Texting stopped allowing the website to use its short code. T-Mobile blocked EZ Texting's short code regardless of EZ Texting's disassociation with the website, anyway, and stated the only way it would unblock EZ Texting's short code was if EZ Texting started the connection process from scratch. During this redundant and unnecessary process, EZ Texting's short code would remain blocked by T-Mobile.

Arent Fox

Because EZ Texting's entire business is based on its connections to mobile phone users, EZ Texting filed the attached lawsuit in order to ensure T-Mobile honored its common carrier obligations and not block calls or discriminate against certain users. Text messages are subject to common carrier obligations and T-Mobile cannot select which text messages its customers receive.

The second episode involves T-Mobile's arbitrary decision to charge a per-message fee to mobile marketing companies that use aggregators to reach T-Mobile's customers. Ironically, T-Mobile forces most mobile marketing companies to use aggregators, yet has decided to charge those same mobile marketing companies \$0.0025 per message in addition to the flat fees that the mobile marketing companies must already pay aggregators. Large companies like Twitter and Facebook, however, are allowed by T-Mobile to directly connect to T-Mobile and will not face such charges. Thus, this fee represents a naked attempt by T-Mobile to gouge smaller mobile marketing companies. While \$0.0025 per message may appear to be a small number, based on typical messaging volume this may add up to many thousands of dollars a month, making it increasingly difficult for smaller, innovative companies to grow and compete with the companies favored by T-Mobile.

If you have any questions or need additional information, please contact me.

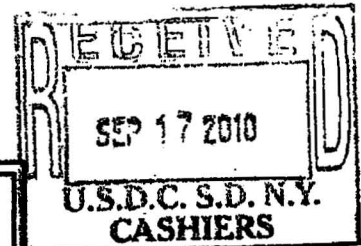
Respectfully submitted,

/s/

Michael B. Hazzard
Counsel to Mobile Internet Content Coalition

Attachment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 9/17/2010

CLUB TEXTING, INC. d/b/a
EZ TEXTING, INC.

Plaintiff,

v.

T-MOBILE USA, INC.

Defendant.

JUDGE CASTEL

10 CIV 7205

**ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND
TEMPORARY RESTRAINING ORDER**

Upon the annexed declaration of Shahriyar ("Shane") Neman, sworn to the 16th day of September, 2010, upon the copy of the complaint hereto annexed, and the Memorandum of Law in Support of Plaintiff's Application For a Temporary Restraining Order or Preliminary Injunction, it is

ORDERED, that the above-named defendant show cause before a motion term of this Court, at Room 12C United States Courthouse, 500 Pearl Street, in the City, County and State of New York, on September 30, 2010, at 2:15 o'clock in the P.M., or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the defendant during the pendency of this action from blocking text messages to and from Plaintiff's short code 313131; and it is further

~~**ORDERED** that, sufficient reason having been shown therefor, pending the hearing on plaintiff's application for a preliminary injunction, pursuant to Rule 65, Fed. R. Civ. P., the~~

defendant is temporarily restrained from blocking text messages to and from Plaintiff's short
code 213131; and it is further

PKC

ORDERED that Plaintiff is not required to post a bond or other security; and it is further

ORDERED that personal service of a copy of this order and annexed papers upon which
it is based upon the defendant or its counsel, by hand delivery or overnight Federal Express
delivery shall be deemed good and sufficient service thereof.

DATED:

9-17-10

ISSUED:

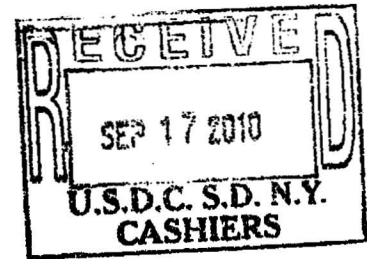
2:50 PM

United States District Judge

PKC

ORDERED answering papers shall
be served and filed by noon September 22
and any reply papers shall be served
by September 24 5 P.M.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



CLUB TEXTING, INC. d/b/a
EZ TEXTING, INC.

Plaintiff,

v.

T-MOBILE USA, INC.

Defendant.

JUDGE CASTEL

10 CIV 7205
Civil Action No. _____

COMPLAINT

COMES NOW, Club Texting, Inc. d/b/a EZ Texting, Inc. ("EZ Texting"), by its undersigned counsel, and brings this Complaint against T-Mobile USA, Inc. ("T-Mobile") and, in support of thereof, states as follows:

INTRODUCTION

1. This is an action seeking declaratory, injunctive relief, and damages arising from T-Mobile's unlawful decision to block its customers from exchanging text message calls to EZ Texting through EZ Texting's "short code," which is akin to a telephone number for text message calls. EZ Texting's short code allows cell phone users to exchange text messages with EZ Texting's customers, who include businesses and non-profits.

2. T-Mobile has blocked its customers from exchanging text messages with EZ Texting's customers because T-Mobile subjectively does not approve of one of the thousands of lawful businesses and non-profits served by EZ Texting. In response, and regardless of the merits of T-Mobile's objections, EZ Texting ended its business relationship with that entity. Despite EZ Texting's immediate acquiescence, T-Mobile began blocking and continues to block

text messages to and from EZ Texting. No T-Mobile customer can send or receive text messages to EZ Texting's customers.

3. As a result of T-Mobile's past and on-going blocking, EZ Texting's business is being irreparably harmed. The ability to exchange text messages with cell phone users is vital to EZ Texting's business. The thousands of EZ Texting's customers, businesses and non-profits, that rely on EZ Texting for text message calling cannot communicate with T-Mobile's cell phone users. Past blocking cannot be undone, and the harm from that blocking is irreparable. If EZ Texting's short code remains blocked, the businesses and non-profits will end their contracts with EZ Texting. T-Mobile's customers will also quit trying to contact EZ Texting, thereby diminishing the value of EZ Texting's business. EZ Texting has been and continues to be irreparably damaged by T-Mobile's unlawful blocking.

PARTIES

4. EZ Texting is a New York corporation with its principal place of business at 244 Fifth Ave, Suite A224, New York, NY 10001.

5. T-Mobile is a Delaware corporation with its principal place of business at Bellevue, Washington.

JURISDICTION AND VENUE

6. This Court has original subject matter jurisdiction over the claims set forth in this Counterclaim pursuant to 28 U.S.C. §§ 1331 and 1338, 47 U.S.C. § 207, and 15 U.S.C. §§ 4 and 15. The matter in controversy relates to rights identified by federal statute, and thus arises under federal statutory and common law, and the amount in controversy exceeds the sum specified in 28 U.S.C. § 1337. This Court has supplemental jurisdiction over the pendant state-

law claims under 28 U.S.C. § 1367. Plaintiff's claim for declaratory relief is cognizable under 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) because T-Mobile does business in this District, and is subject to personal jurisdiction here.

FACTS

A. EZ Texting's Business

8. EZ Texting provides and implements interactive text messaging promotions, and its business model depends on "short codes" being connected to various wireless service providers, including T-Mobile.

9. EZ Texting's short code is essentially a six digit telephone number (313131) which allows cell phone users to send text message calls to EZ Texting's customers. EZ Texting may also use the short code to contact cell phone users who have expressed an interest in EZ Texting's marketing by "opting in" to EZ Texting's short code. In other words, EZ Texting does not send text messages to cell phone users unless they have asked to receive them. And, a cell phone user can request EZ Texting stop sending text messages at any time.

10. A variety of businesses and non-profits use EZ Texting's software to market their products and services to existing and potential customers with text messages. For example, a party rental company may advertise to a potential customer to text "PARTY" to 313131 to receive information about the rental services provided. A church could send its schedule to a cell phone user who texted "CHURCH" to 313131. Again, cell phone users only receive text message calls from EZ Texting's customers after they affirmatively request that such text messages be sent to them. Moreover, consumers can stop receiving these messages whenever

they want. T-Mobile does not claim that EZ Texting has sent unwanted text messages from any business or non-profit.

11. These businesses and non-profits enter into contracts with EZ Texting who helps them design and monitor their marketing campaigns to ensure they comply with the myriad wireless service providers' guidelines and rules. EZ Texting has created software which allows the businesses and non-profits to set up the text messages they will send in response to a cell phone user's text message to them.

12. EZ Texting has a rigorous screening process to ensure that the businesses and non-profits that use EZ Texting to send text messages are doing so in compliance with all applicable laws and regulations.

13. T-Mobile has never claimed that any text message sent by an EZ Texting customer violates any law or government regulation.

B. The Wireless Service Providers

14. The wireless service providers do not link directly with short code holders like EZ Texting. Instead, their agents, known as "aggregators," are usually connected to companies like EZ Texting. Thus, EZ Texting's network is thus indirectly interconnected with T-Mobile for purposes of exchange text message calls.

15. The aggregator at issue in this case for T-Mobile is Open Market, Inc. ("Open Market"). EZ Texting connects through a company called 4INFO, Inc. ("4INFO") who then connects to Open Market.

16. In other words, EZ Texting is connected to 4INFO who connects to Open Market who then connects to T-Mobile.

17. EZ Texting has been indirectly connected to T-Mobile for over three years. T-Mobile has never blocked EZ Texting before now.

C. Unlawful Blocking By T-Mobile

18. Starting on or about Friday, September 10, 2010, T-Mobile began illegally blocking its customers from sending or receiving text messages to or from EZ Texting.

19. EZ Texting contacted T-Mobile, Open Market, and 4INFO to determine the reason T-Mobile was blocking text messages to and from EZ Texting.

20. The stated reason was that T-Mobile did not approve of EZ Texting's business relationship with the website <http://legalmarijuanadispensary.com> (the "website"). This website was using EZ Texting to send and receive text messages in relation to information on the website regarding accessing legal medical marijuana in California. Text messages concerning this website were only sent to cell phone users who specifically requested information from the website. EZ Texting believed the website was acceptable under all applicable laws and regulations, and therefore its association with EZ Texting would not be protested by any wireless service provider.

21. This stated reason confirmed what EZ Texting had heard earlier through industry contacts: that T-Mobile had learned of the website, did not approve of the website, and was planning on blocking text messages to and from EZ Texting because of it.

22. Regardless of the merits of T-Mobile's disapproval of the website, EZ Texting immediately had the website remove its short code and related webpage to avoid blocking by T-Mobile. EZ Texting also suspended the customer in question's use of EZ Texting's 313131 short code. This occurred on or about Thursday, September 9, 2010, even before T-Mobile began blocking.

23. Even though EZ Texting had immediately terminated its relationship with the website at issue, T-Mobile began blocking all text messages to and from all of EZ Texting's customers on or about Friday, September 10, 2010.

24. Despite EZ Texting's efforts to have its indirect interconnection with T-Mobile unblocked, T-Mobile has refused.

25. T-Mobile has stated that it will not stop blocking text messages exchanged with EZ Texting over the existing indirect interconnection facilities. Rather, T-Mobile has directed that EZ Texting start this indirect interconnection process from scratch, even though EZ Texting has been interconnected with T-Mobile for over three years for purposes of exchanging text messages. Re-doing this process to create new indirect interconnection facilities would take approximately six months and create significant, needless expense for EZ Texting. During this six month period (or perhaps even longer), text messages to and from EZ Texting's customers would remain blocked by T-Mobile.

26. Upon information and belief, T-Mobile has not subjected any other mobile marketing company similar to EZ Texting to such a burdensome process.

27. Upon information and belief, T-Mobile is connected to a number of other companies similar to EZ Texting such as Twitter (twitter.com), Clickatell (Pty) Ltd (clickatell.com), TextMarks, Inc. (TextMarks.com), 4INFO, Inc. (4info.com), Opt It, Inc. (Optit.com), Tatango, Inc. (Tatango.com), DoCircle, Inc. dba Trumpia (Trumpia.com), Izigg.com, Protexting.com, InvolveMobile.com, and mobileStorm (mobileStorm.com).

28. Other wireless service providers were also aware of the website, but none have blocked EZ Texting based on it.

D. Irreparable Harm

29. EZ Texting is being irreparably harmed by T-Mobile's past and on-going blocking.

30. A T-Mobile customer that is blocked cannot access content which they desire. Access to that content later is not a substitute for earlier blocked content.

31. T-Mobile customers will stop sending EZ Texting text messages when they are blocked.

32. The business and non-profits that use EZ Texting to send and receive text messages will stop using EZ Texting if they cannot be reached by T-Mobile's customers.

33. EZ Texting will not be able to attract new business because of T-Mobile's blocking.

34. EZ Texting will be put out of business if businesses and non-profits do not use EZ Texting's services.

35. The value of EZ Texting's short code, and therefore EZ Texting's business, will also be irreparably damaged if cell phone users, businesses, and non-profits view it as subject to blocking by T-Mobile.

COUNT I

(Unlawful Call Blocking – Telecommunications Act of 1996, 47 U.S.C. § 201)

36. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 35, above.

37. EZ Texting's business of providing businesses and non-profits with interactive text messaging mobile marketing software and programs depends on its network being interconnected with the various wireless or cell phone carriers, including T-Mobile. EZ

Texting indirectly interconnects through third-party vendors called “aggregators” who in turn connect to the wireless carriers or cell phone providers.

38. T-Mobile is maintaining a block on the exchange of text message calls with EZ Texting.

39. T-Mobile, as a cellular phone company, is deemed a common carrier under the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. As such, it is obligated to engage only in just and reasonable practices involving its communications services pursuant to, *inter alia*, Section 201 of the Telecommunications Act.

40. The Federal Communications Commission has held that a text message is a call. *See e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (deferring to Federal Communications Commission’s determination that a text message is a call for purposes of the Telephone Consumer Protection Act, 47 U.S.C. § 227).

41. T-Mobile’s blocking of its consumers’ text messages to and from EZ Texting violates the Telecommunications Act’s anti-call blocking policy, 47 U.S.C. § 201. *See e.g., Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, 22 FCC Red 11629 (2007) (prohibiting common carriers from call blocking).

42. A private right of action exists for claims brought against a common carrier for violation of 47 U.S.C. § 201. Pursuant to Sections 206 and 207 of the Telecommunications Act, 47 U.S.C. §§ 206, 207, EZ Texting seeks the recovery of damages resulting from T-Mobile’s call blocking actions, as alleged above. The precise amount of said damages is not known with certainty, but on information and belief exceeds \$75,000 exclusive of attorney’s fees and costs.

43. Such actions also threaten EZ Texting with irreparable harm to its business and market position. The dollar value of such harm is difficult to ascertain and money damages are inadequate to remedy same, and therefore EZ Texting is entitled to preliminary and permanent injunctive relief against such actions.

COUNT II
(Tortious Interference With Contractual Relations)

44. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 43, above.

45. EZ Texting has contracts with many businesses and non-profits to serve as their mobile marketing partner for text message exchange. EZ Texting helps create mobile marketing campaigns for its business and non-profit partners to enable customers to reach them using text messages. EZ Texting also gives the businesses and non-profits access to EZ Texting's software to create, receive, and send these text messages over EZ Texting's short code. These business and non-profit contracts are vital to EZ Texting's business.

46. T-Mobile had knowledge of EZ Texting's contracts. T-Mobile knows that EZ Texting provides businesses and non-profits with the use of EZ Texting for text message exchange. The businesses and non-profits often put EZ Texting's short code on their websites. T-Mobile reviews websites advertising EZ Texting's short code to determine whether it approves of the business or what is being advertised over the short code. T-Mobile reviews text messages to EZ Texting's customers to determine whether T-Mobile approves of the content of those text messages.

47. T-Mobile is maintaining a block on the exchange of text message calls with EZ Texting.

48. Thus, T-Mobile knows about EZ Texting's contracts with its business and non-profit partners.

49. T-Mobile is blocking text messages to and from EZ Texting with the intent to interfere with EZ Texting's contracts with its business and non-profit partners who were using EZ Texting for lawful mobile marketing purposes.

50. EZ Texting has been damaged by T-Mobile's intentional interference with EZ Texting's contracts in amount to be determined at trial.

COUNT III

(Unlawful Discrimination – Telecommunications Act of 1996, 47 U.S.C. § 202(a))

51. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 50, above.

52. EZ Texting's business of providing businesses and non-profits with interactive text messaging mobile marketing software and programs depends on its short code being interconnected with the various wireless or cell phone carrier networks, including T-Mobile. EZ Texting interconnects indirectly through third-party vendors called "aggregators" who in turn connect to the wireless carriers or cell phone providers.

53. T-Mobile is maintaining a block on the exchange of text message calls with EZ Texting.

54. T-Mobile, as a cellular phone company, is deemed a common carrier under the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. As such, it is obligated to provide all persons access to its services on a nondiscriminatory basis pursuant to, *inter alia*, Section 202(a) of the Telecommunications Act.

55. T-Mobile's refusal to exchange text messages with EZ Texting violates the Telecommunications Act's nondiscrimination policy, 47 U.S.C. § 202(a).

56. A private right of action exists for claims brought against a common carrier for violation of 47 U.S.C. § 202(a). Pursuant to Sections 206 and 207 of the Telecommunications Act, 47 U.S.C. §§ 206, 207, EZ Texting seeks the recovery of damages resulting from T-Mobile's discriminatory actions, as alleged above. The precise amount of said damages is not known with certainty, but on information and belief exceeds \$75,000 exclusive of attorney's fees and costs.

57. Such actions also threaten EZ Texting with irreparable harm to its business and market position. The dollar value of such harm is difficult to ascertain and money damages are inadequate to remedy same, and therefore EZ Texting is entitled to preliminary and permanent injunctive relief against such actions.

COUNT IV
(Illegal Restraint of Trade – Sherman Antitrust Act, 15 U.S.C. § 1)

58. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 57, above.

59. In an effort to further its unlawful call blocking and discriminatory policy of blocking text messages to and from EZ Texting, T-Mobile has coerced EZ Texting's aggregator, Open Market (and thus 4INFO) to refuse to connect EZ Texting to the T-Mobile network, which constitutes a coerced agreement in unreasonable restraint of trade in violation of Section One of the Sherman Antitrust Act, 15 U.S.C. § 1.

60. Upon information and belief, T-Mobile and Open Market have communicated with each other on or about September 10, 2010 and subsequently, and T-Mobile has told Open Market (and thus 4INFO) to refuse to connect EZ Texting to the T-Mobile network. Open Market has agreed.

61. As a proximate result thereof, EZ Texting has suffered antitrust damage, that is, damage of the type intended to be proscribed by the antitrust laws, in that EZ Texting is less able to compete effectively in the relevant market for provision of mobile marketing and advertising services, and competition therein has been harmed. The amount of said damages is uncertain, but on information and belief exceeds \$75,000 exclusive of attorney's fees and costs.

62. Such actions also threaten EZ Texting with irreparable harm to its business and market position. The dollar value of such harm is difficult to ascertain and money damages are inadequate to remedy same, and therefore EZ Texting is entitled to preliminary and permanent injunctive relief against such actions.

63. Pursuant to 15 U.S.C. § 15, EZ Texting seeks the recovery of treble damages resulting from T-Mobile's unlawful and coerced agreement.

COUNT V
(Declaratory Judgment)

64. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 63, above.

65. A present, actionable and justiciable controversy exists with respect to the legal rights between the parties. Such controversy arises under the Federal Communications Act, 47 U.S.C. §§ 201, *et seq.*; Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*; and under the laws of the United States. Litigation between the parties is unavoidable.

66. T-Mobile's blocking of text messages to and from EZ Texting is an ongoing and repeated practice.

67. On information and belief, absent a declaratory judgment, T-Mobile will continue its wrongful practice of blocking text messages to and from EZ Texting.

68. It would be unduly burdensome and inefficient for Plaintiff to bring new actions for damages each time T-Mobile blocks text messages to and from EZ Texting.

69. Accordingly, Plaintiff is entitled to a declaratory judgment and such further relief based upon that declaratory judgment as the Court deems proper, pursuant to 28 U.S.C. §§ 2201 and 2202, determining that :

- a. Plaintiff may send lawful content to T-Mobile's customers regardless of T-Mobile's approval of the content of those text messages; and
- b. T-Mobile cannot block text messages to and from EZ Texting based on the lawful content of EZ Texting's text messages.

COUNT VI
(Injunctive Relief)

70. Plaintiff re-alleges and incorporates the allegations of paragraphs 1 through 69, above.

71. EZ Texting requests that this Court preliminarily and permanently enjoin T-Mobile from blocking text messages to and from EZ Texting.

72. EZ Texting faces immediate and irreparable harm if blocking by T-Mobile continues.

73. A T-Mobile customer that is blocked cannot access content which they desire. Access to that content later is not a substitute for earlier blocked content.

74. T-Mobile customers will stop sending EZ Texting text messages when they are blocked.

75. The business and non-profits that use EZ Texting to send and receive text messages will stop using EZ Texting if they cannot be reached by T-Mobile's customers.

76. EZ Texting will not be able to attract new business because of T-Mobile's blocking.

77. EZ Texting will be put out of business if businesses and non-profits do not use EZ Texting's services.

78. The value of EZ Texting's short code, and therefore EZ Texting's business, will also be irreparably damaged if cell phone users, businesses, and non-profits view it as subject to blocking by T-Mobile.

WHEREFORE, Plaintiff prays that this Court:

- a) Preliminarily and permanently enjoin T-Mobile from blocking text messages to and from EZ Texting;
- b) Award Plaintiff damages for call blocking in amount to be determined at trial;
- c) Award Plaintiff damages for tortious interference with contractual relations in amount to be determined at trial;
- d) Award Plaintiff damages for discrimination in amount to be determined at trial;
- e) Award Plaintiff damages for antitrust violations in amount to be determined at trial;
- f) Award Plaintiff treble damages and attorneys' fees and costs for antitrust violations in amount to be determined at trial;
- g) Issue a declaratory judgment that Plaintiff may send lawful content to T-Mobile's customers regardless of T-Mobile's approval of the content of those text messages; and T-Mobile cannot block text messages to and from EZ Texting short code based on the content lawful of EZ Texting's text messages;

- h) Preliminary and permanent injunctive relief against T-Mobile's illegal call blocking of EZ Texting;
- i) Preliminary and permanent injunctive relief against T-Mobile's illegal discrimination and denial of service to EZ Texting;
- j) Preliminary and permanent injunctive relief against T-Mobile's coercion of aggregators and refusal to provision EZ Texting's "short codes" or to carry programs or content from EZ Texting over T-Mobile's wireless network.
- k) Tax the costs, fees, and expenses of this action to T-Mobile, including the reasonable attorneys' fees and expert witness fees of Plaintiff pursuant to 47 U.S.C. § 206 and to the extent permitted by law;
- l) Award such other and further relief as the Court deems just and proper.

September 17, 2010.

Respectfully submitted,

By: 

Jayne S. Robinson, Esq.
ROBINSON & MCDONALD LLP
61 Broadway
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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CLUB TEXTING, INC. d/b/a
EZ TEXTING, INC.

Plaintiff,

v.

T-MOBILE USA, INC.

Defendant.

Civil Action No. _____

DECLARATION OF SHAHRIYAR NEMAN
IN SUPPORT OF ORDER TO SHOW CAUSE

I, Shahriyar ("Shane") Neman, declare pursuant to 28 U.S.C. § 1746:

1. I am the Chief Executive Officer of Club Texting, Inc. d/b/a EZ Texting, Inc. ("EZ Texting"). I submit this Declaration pursuant to Fed. R. Civ. P. 65(b) and Local Rule 6.1(d) in support of Plaintiff's application for a temporary restraining order and an Order to Show Cause for a preliminary injunction enjoining Defendant T-Mobile USA, Inc. ("T-Mobile") from blocking text messages to and from EZ Texting.

2. EZ Texting filed this action based on T-Mobile's unlawful blocking of its customers' messages being sent to or received by EZ Texting's short code 313131, a practice that T-Mobile began on or about Friday, September 10, 2010 and which has continued unabated despite demand by EZ Texting that T-Mobile stop this unlawful action.

3. EZ Texting is being irreparably damaged in its business because of the blocking by T-Mobile. The ability to exchange text message calls with all cell phone users is vital to EZ Texting's business. The thousands of EZ Texting's customers – which include both for-profit businesses and non-profit organizations – that rely on EZ Texting's short code (which is akin to a

telephone number for text messages) cannot be reached by T-Mobile's cell phone users, nor can those businesses and non-profits reach T-Mobile's cell phone users.

A. EZ Texting's Business

4. EZ Texting was formed in 2006 to provide mobile marketing services to businesses and non-profits.

5. EZ Texting provides and implements interactive text messaging promotions, and its business model depends on "short codes" being connected to the nation's various wireless service providers, including T-Mobile. EZ Texting's short code allows cell phone users to exchange text messages with EZ Texting's customers, which, again, include both for-profit businesses and non-profit organizations.

6. EZ Texting's short code is a six digit telephone number (313131), which allows cell phone users to send text messages to EZ Texting. EZ Texting also uses the short code to contact cell phone users who have expressed an interest in EZ Texting's marketing by "opting in" to EZ Texting's short code. In other words, EZ Texting does not send text messages to cell phone users unless they have asked to receive them. (And, a customer can always change his or her mind and stop receiving such messages upon request.)

7. EZ Texting provides what is known as "group" text messaging. EZ Texting's short code is shared by a variety of businesses and non-profits to communicate with cell phone users. EZ Texting offers a less expensive mobile-marketing alternative to businesses and non-profits who cannot afford to obtain or will not derive sufficient value from owning their own short code.

8. A shared short code is common in the mobile marketing industry, and used by many other mobile marketing companies similar to EZ Texting, companies with which EZ Texting competes.

9. The shared short code allows a variety of businesses and non-profits to use EZ Texting's software to market their products and services to existing and potential customers with text messages. For example, a party rental company may advertise to a potential customer to text "PARTY" to 313131 to receive information about the rental services provided. A church customer likewise could send its services schedule to a cell phone user who texted "CHURCH" to 313131.

10. Again, cell phone users only receive text message calls from EZ Texting's customers after they affirmatively request that such text messages be sent to them. Moreover, consumers can stop receiving these messages whenever they want. EZ Texting does not send unwanted text messages from any business or non-profit organization.

11. These businesses and non-profits enter into contracts with EZ Texting, who helps them design and monitor their marketing campaigns to ensure they comply with the myriad wireless service providers' guidelines and rules. EZ Texting has created software which allows the businesses and non-profits to set up the text messages they will send in response to a cell phone user's text message to them.

12. EZ Texting has a rigorous screening process to ensure that the businesses and non-profits that use EZ Texting to send text messages are doing so in compliance with all applicable laws and regulations.

B. The Wireless Service Providers

13. EZ Texting's business, like its competitors', depends on being connected to the nation's wireless service providers, so that the businesses and non-profits can exchange text messages with the wireless service providers' customers.

14. The wireless service providers, such as T-Mobile, do not link directly with short code holders like EZ Texting. Instead, the wireless carriers' agents, known as "aggregators," are usually connected to companies like EZ Texting. Thus, EZ Texting's network is thus indirectly interconnected with T-Mobile for purposes of exchanging text message calls.

15. The aggregator at issue in this case for T-Mobile is Open Market, Inc. ("Open Market"). EZ Texting connects through a company called 4INFO, Inc. ("4INFO") who then connects to Open Market.

16. In other words, EZ Texting is connected to 4INFO who connects to Open Market who then connects to T-Mobile.

17. EZ Texting's network is thus indirectly interconnected with T-Mobile.

18. EZ Texting has been indirectly connected to T-Mobile for over 3 years. T-Mobile has never blocked EZ Texting before now.

C. Unlawful Blocking By T-Mobile

19. On or about Thursday, September 9, 2010, EZ Texting learned through industry contacts that unnamed wireless providers had learned of a business using EZ Texting's short code that they did not approve of.

20. This EZ Texting short-code user's website of which these unnamed wireless providers reportedly did not approve, <http://www.legalmarijuanadispendary.com> (the "website"), contains information regarding accessing legal medical marijuana in California and other states

where it is legal. The website advertised that users who sought relevant information could receive such information by using EZ Texting's short codes. Cell phone users, including T-Mobile's, have been receiving such information from this particular EZ Texting customer via short code 313131 without incident since approximately June 2009.

21. Because medical marijuana is legal in California and the other states identified on the website, and the website did not advocate illegal drug use or medical marijuana use in places where it was not legal, there is nothing illegal or objectionable about this website using text message calls to communicate with interested parties.

22. The website also followed the same "opt-in" requirements to send text messages as every other business. Text messages concerning this website were only sent to cell phone users who specifically requested information from the website.

23. On or about Thursday, September 9, 2010, EZ Texting learned from Open Market and 4INFO that unnamed wireless service providers found the website objectionable. EZ Texting also learned that those unnamed wireless service providers planned on blocking EZ Texting's customer's text messages based on the website, well over a year after cell phone users had been communicating with this EZ Texting customer without incident.

24. Although the website is lawful and unobjectionable, to avoid wholesale injury to all of EZ Texting's customers and EZ Texting's relationships with its customers, EZ Texting immediately had the website remove EZ Texting's short code and related webpage to avoid being blocked by any wireless service provider. EZ Texting also suspended the customer in question's use of EZ Texting's 313131 short code.

25. On or about Thursday, September 9, 2010, EZ Texting communicated to Open Market and 4INFO that the website, at EZ Texting's request, no longer advertised EZ Texting's

short code, and that EZ Texting was no longer serving this customer's messages to or from the 313131 short code. Upon information and belief, Open Market or 4INFO or both contacted T-Mobile and alerted T-Mobile that the website had been taken down. This all occurred on or about Thursday, September 9, 2010, even before T-Mobile began blocking.

26. Starting on or about Friday, September 10, 2010, however, T-Mobile began illegally blocking its customers from sending or receiving text messages to or from *all* of EZ Texting's customers by blocking all messages sent to or received from EZ Texting's short code, 313131.

27. On or about Friday, September 10, 2010, EZ Texting and its representatives contacted T-Mobile, Open Market, and 4INFO to determine the reason T-Mobile was blocking text messages to and from EZ Texting.

28. T-Mobile and its representatives confirmed that T-Mobile was blocking EZ Texting based on the website, even though the website had been removed from EZ Texting's short code.

29. In other words, even when EZ Texting acceded to T-Mobile's (unreasonable and unlawful) demand simply to prevent further damage to EZ Texting's entire business, EZ Texting's short code was still blocked by T-Mobile.

30. T-Mobile and its representatives also stated that they did not approve of shared short codes, or at least, EZ Texting's shared short code.

31. Based on my industry knowledge, T-Mobile allows other companies to use shared short codes to exchange text messages with T-Mobile's customers.

32. Even though EZ Texting had immediately terminated its relationship with the website at issue and communicated that fact to T-Mobile and its agents, T-Mobile has continued

to block EZ Texting's short code since Friday, September 10, 2010. This action has imperiled EZ Texting's relationship with all of its customers, whose identities I cannot reveal for fear that EZ Texting's competitors, who are not having messages to and from their short codes unlawfully blocked by T-Mobile, soliciting these customers.

33. Despite all of EZ Texting's efforts to have its indirect interconnection with T-Mobile unblocked, T-Mobile has refused.

34. T-Mobile has stated that it will not stop blocking text messages exchanged with EZ Texting over the existing indirect interconnection facilities. Rather, T-Mobile has directed that EZ Texting start this indirect interconnection process entirely anew, even though EZ Texting has been interconnected with T-Mobile for over three years for purposes of exchanging text messages.

35. Re-starting the indirect-interconnection process to create new indirect interconnection facilities would take approximately six months and create significant, needless expense for EZ Texting, and again imperil all of EZ Texting's existing customer relationships. During this six month (or perhaps longer) period, text messages to and from EZ Texting's customers would remain blocked by T-Mobile. To my knowledge, T-Mobile has not subjected any other mobile marketing company similar to EZ Texting to such a burdensome process.

36. To my knowledge, T-Mobile is connected to a number of other mobile-marketing companies with which EZ Texting competes, such as Twitter (twitter.com), Clickatell (Pty) Ltd (clickatell.com), TextMarks, Inc. (TextMarks.com), 4INFO, Inc. (4info.com), Opt It, Inc. (Optit.com), Tatango, Inc. (Tatango.com), DoCircle, Inc. d/b/a Trumpia (Trumpia.com), Izigg.com, Protexting.com, InvolveMobile.com, and mobileStorm (mobileStorm.com).

44. EZ Texting also cannot attract new business because of T-Mobile's blocking. Given the competitive mobile-marketing marketplace, businesses and non-profits will not use EZ Texting if they cannot exchange text messages with T-Mobile, particularly when there are various market participants whose short codes are not being blocked by T-Mobile.

45. It will be inherently difficult, if not impossible, for EZ Texting to quantify the damage T-Mobile is causing it by blocking its short code.

46. EZ Texting will be put out of business if businesses and non-profits do not use EZ Texting's services and EZ Texting cannot attract new business.

47. T-Mobile customers will stop – and presumably have stopped – sending EZ Texting text messages now that they are blocked by T-Mobile.

48. The value of EZ Texting's short code, and therefore EZ Texting's business, is irreparably damaged if cell phone users, businesses, and non-profits view it as subject to blocking by T-Mobile.

49. EZ Texting is being irreparably harmed by T-Mobile's blocking.


50. If T-Mobile is enjoined from blocking EZ Texting's text messages, the parties will simply be restored to the same relationship they were in before Friday, September 10, 2010. Again, T-Mobile's customers interacted without incident with the various users of short code 313131, including the website user that T-Mobile took issue with, since that user began using the short code in June 2009, and well before that.

51. T-Mobile will experience no burden in unblocking EZ Texting.

[signature block on next page]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 9/16/10


Shahriyar Neman

NO PRIOR REQUEST FOR THIS RELIEF
HAS BEEN GRANTED. JAR

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CLUB TEXTING, INC. d/b/a
EZ TEXTING, INC.

Plaintiff,

v.

T-MOBILE USA, INC.

Defendant.

Civil Action No. 10-CIV-7205

**MEMORANDUM IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND
APPLICATION FOR PRELIMINARY INJUNCTION**

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Club Texting, Inc. d/b/a EZ Texting, Inc. ("EZ Texting"), by its undersigned counsel, moves for a temporary restraining order against T-Mobile USA, Inc. ("T-Mobile") and states as follows:

I. RELIEF REQUESTED

EZ Texting requests an Order ruling that:

- A. T-Mobile is enjoined from blocking text messages to and from EZ Texting;
- B. granting EZ Texting such other and further relief as the Court shall deem just and equitable.

II. PRELIMINARY STATEMENT

This action arises from T-Mobile's unlawful decision to block its customers from exchanging text message calls to EZ Texting through EZ Texting's "short code," which is akin to a telephone number for text message calls. EZ Texting is a mobile marketing company that uses a short code (313131) to send text messages to cell phone users who request them from businesses and non-profits who use EZ Texting's services. EZ Texting's short code allows cell phone users to exchange text messages with EZ Texting's customers.

On or about Friday, September 10, 2010, T-Mobile started blocking its customers from exchanging text messages with EZ Texting's customers because T-Mobile subjectively did not approve of one of the thousands of lawful businesses and non-profits served by EZ Texting. In response, and regardless of the merits of T-Mobile's objections, EZ Texting suspended the customer in question's use of EZ Texting's 313131 short code. Despite EZ Texting's immediate acquiescence to T-Mobile's objections, T-Mobile began blocking and continues to block text messages to and from EZ Texting. No T-Mobile customer can send or receive text messages to EZ Texting's customers.

As a result of T-Mobile's past and on-going blocking, EZ Texting's business is being irreparably harmed. The ability to exchange text messages with cell phone users is vital to EZ Texting's business. The thousands of EZ Texting's customers, businesses and non-profits, that rely on EZ Texting for text message calling cannot communicate with T-Mobile's cell phone users. Past blocking cannot be undone, and the harm from that blocking is irreparable. EZ Texting's customers are already complaining to EZ Texting about their inability to exchange text messages with T-Mobile's customers. If EZ Texting's short code remains blocked, the businesses and non-profits will end their contracts with EZ Texting. T-Mobile's customers will also quit trying to contact EZ Texting, thereby diminishing the value of EZ Texting's business. Therefore, EZ Texting has been and continues to be irreparably damaged by T-Mobile's unlawful blocking.

III. STATEMENT OF FACTS

This Statement of Facts is based on the Complaint and Declaration of Shahriyar Neman filed herewith. EZ Texting was formed in 2006 and provides and implements interactive text messaging promotions, and its business model depends on "short codes" being connected to various wireless service providers, including T-Mobile. EZ Texting's short code is essentially a six digit telephone number (313131) which allows cell phone users to send text message calls to EZ Texting's customers. EZ Texting may also use the short code to contact cell phone users who have expressed an interest in EZ Texting's marketing by "opting in" to EZ Texting's short code. In other words, EZ Texting does not send text messages to cell phone users unless they have asked to receive them. And, a cell phone user can request EZ Texting stop sending text messages at any time.

A variety of businesses and non-profits use EZ Texting's software to market their products and services to existing and potential customers with text messages. For example, a party rental company may advertise to a potential customer to text "PARTY" to 313131 to receive information about the rental services provided. A church could send its schedule to a cell phone user who texted "CHURCH" to 313131. Again, cell phone users only receive text message calls from EZ Texting's customers after they affirmatively request that such text messages be sent to them. Moreover, consumers can stop receiving these messages whenever they want. T-Mobile does not claim that EZ Texting has sent unwanted text messages from any business or non-profit.

These businesses and non-profits enter into contracts with EZ Texting who helps them design and monitor their marketing campaigns to ensure they comply with the myriad wireless service providers' guidelines and rules. EZ Texting has created software which allows the businesses and non-profits to set up the text messages they will send in response to a cell phone user's text message to them.

EZ Texting has a rigorous screening process to ensure that the businesses and non-profits that use EZ Texting to send text messages are doing so in compliance with all applicable laws and regulations. T-Mobile has never claimed that any text message sent by an EZ Texting customer violates any law or government regulation.

EZ Texting's business depends on being connected to the wireless service providers. The wireless service providers do not link directly with short code holders like EZ Texting. Instead, their agents, known as "aggregators," are usually connected to companies like EZ Texting. Thus, EZ Texting's network is thus indirectly interconnected with T-Mobile for purposes of exchange text message calls.

The aggregator at issue in this case for T-Mobile is Open Market, Inc. ("Open Market"). EZ Texting connects through a company called 4INFO, Inc. ("4INFO") who then connects to Open Market. In other words, EZ Texting is connected to 4INFO who connects to Open Market who then connects to T-Mobile. EZ Texting has been indirectly connected to T-Mobile for over three years. T-Mobile has never blocked EZ Texting before now.

Starting on or about Friday, September 10, 2010, T-Mobile began illegally blocking its customers from sending or receiving text messages to or from EZ Texting. EZ Texting contacted T-Mobile, Open Market, and 4INFO to determine the reason T-Mobile was blocking text messages to and from EZ Texting.

The stated reason was that T-Mobile did not approve of EZ Texting's business relationship with the website <http://legalmarijuanadispendary.com> (the "website"). This website was using EZ Texting to send and receive text messages in relation to information on the website regarding accessing legal medical marijuana in California. EZ Texting had been working with this website for over a year before T-Mobile's current objections arose. Text messages concerning this website were only sent to cell phone users who specifically requested information from the website. EZ Texting believed the website was acceptable under all applicable laws and regulations, and therefore its association with EZ Texting would not be protested by any wireless service provider.

This stated reason confirmed what EZ Texting had heard earlier through industry contacts: that T-Mobile had learned of the website, did not approve of the website, and was planning on blocking text messages to and from EZ Texting because of it. Regardless of the merits of T-Mobile's disapproval of the website, EZ Texting immediately had the website remove its short code and related webpage to avoid blocking by T-Mobile. EZ Texting also

suspended the customer in question's use of EZ Texting's 313131 short code. This occurred on or about Thursday, September 9, 2010, even before T-Mobile began blocking.

Even though EZ Texting had immediately terminated its relationship with the website at issue and communicated such to T-Mobile, T-Mobile began blocking all text messages to and from all of EZ Texting's customers on or about Friday, September 10, 2010.

Despite EZ Texting's efforts to have its indirect interconnection with T-Mobile unblocked, T-Mobile has refused. T-Mobile has stated that it will not stop blocking text messages exchanged with EZ Texting over the existing indirect interconnection facilities. Rather, T-Mobile has directed that EZ Texting start this indirect interconnection process from scratch, even though EZ Texting has been interconnected with T-Mobile for over three years for purposes of exchanging text messages. Re-doing this process to create new indirect interconnection facilities would take approximately six months and create significant, needless expense for EZ Texting. During this six month period (or perhaps even longer), text messages to and from EZ Texting's customers would remain blocked by T-Mobile. Upon information and belief, T-Mobile has not subjected any other mobile marketing company similar to EZ Texting to such a burdensome process.

Upon information and belief, T-Mobile is connected to a number of other companies similar to EZ Texting such as Twitter (twitter.com), Clickatell (Pty) Ltd (clickatell.com), TextMarks, Inc. (TextMarks.com), 4INFO, Inc. (4info.com), Opt It, Inc. (Optit.com), Tatango, Inc. (Tatango.com), DoCircle, Inc. dba Trumpia (Trumpia.com), Izigg.com, Protexting.com, Involvemobile.com, and mobileStorm (mobileStorm.com). Other wireless service providers were also aware of the website, but none have blocked EZ Texting based on it.

EZ Texting is being irreparably harmed by T-Mobile's past and on-going blocking. EZ Texting faces immediate irreparable harm because T-Mobile customers cannot exchange text messages with EZ Texting's customers. A T-Mobile customer that is blocked cannot access content which they desire. Access to that content later is not a substitute for earlier blocked content. Over the several days during which T-Mobile has maintained the blocking, EZ Texting has received numerous complaints from its customers about their inability to exchange text messages with T-Mobile's customers.

In addition to the current on-going irreparable harm, T-Mobile customers will stop sending EZ Texting text messages when they are blocked. EZ Texting's customers are already complaining to EZ Texting about their inability to exchange text messages with T-Mobile's customers. The business and non-profits that use EZ Texting to send and receive text messages will likely stop using EZ Texting if they cannot be reached by T-Mobile's customers. EZ Texting will not be able to attract new business because of T-Mobile's blocking. EZ Texting will be put out of business if businesses and non-profits do not use EZ Texting's services. The value of EZ Texting's short code, and therefore EZ Texting's business, will also be irreparably damaged if cell phone users, businesses, and non-profits view it as subject to blocking by T-Mobile.

IV. STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER

To receive a temporary restraining order or a preliminary injunction, the movant must make a showing of: "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 476 (2d. Cir.2004); *Monserate*

v. New York State Senate, 599 F.3d 148, 154 (2d Cir. Mar. 16, 2010). The standard for a temporary restraining order is the same as for a preliminary injunction in the Second Circuit. *Jackson v. Johnson*, 962 F. Supp. 391, 392 (S.D.N.Y. 1997).

The movant does not need to provide evidence guaranteeing a verdict in his favor but, rather, only must establish a reasonable probability of success. *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *see also Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975) (“It is not necessary that the moving party’s right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a prima facie case showing a reasonable probability that it will prevail on the merits.”). When applying this standard, a district court may rely on the complaint, declarations and other hearsay as such evidence is appropriate given the character and objectives of an injunction proceeding. *Levi Strauss*, 51 F.3d at 985.

V. ARGUMENT

A. EZ Texting faces irreparable harm if T-Mobile is not enjoined from blocking.

EZ Texting’s entire business is based on the ability of its customers to exchange text message calls to the customers of wireless service providers like T-Mobile. T-Mobile is maintaining a block on text messages to and from EZ Texting’s short code (313131). A short code is essentially a telephone number for text message calls. T-Mobile’s unlawful blocking is presently and irreparably harming EZ Texting by foreclosing T-Mobile’s customers from exchange text messages with EZ Texting’s customers using the 313131 short code.

Four wireless service providers control the vast majority of the wireless telecommunications market, with T-Mobile controlling approximately 15% of that market. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual*

Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 09-66, Fourteenth Report, FCC 10-81, 2010 WL 2020768, *2 & *5 (rel. May 20, 2010). T-Mobile's unlawful blocking of EZ Texting precludes EZ Texting and its current and prospective customers from reaching those millions of T-Mobile customers, and likewise those millions of T-Mobile customers cannot reach EZ Texting's customers. Even the loss of contact with a portion of the overall cell phone user population is irreparable harm. *See e.g., Donohue v. Paterson*, Nos. 1:10-CV-00543, 10-CV-00544, 1:10-CV-00546, 1:10-CV-00549, 2010 WL 2134140, *3 (N.D.N.Y. May 12, 2010) ("Plaintiffs meet their burden of showing that the permanent 20% loss in salary or wages that directly follows from the furlough plan constitutes irreparable harm.").

An irreparable harm is a harm for which "a monetary award cannot be adequate." *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979). Here, EZ Texting cannot be compensated by the loss of goodwill when its customers cannot exchange text messages with T-Mobile's customers. Blocking, once done, cannot be undone. Moreover, EZ Texting's entire business will fail because it cannot send or receive text messages from one of the nation's largest wireless service providers. Not only are *all* of EZ Texting's current customers incapable of reaching a significant share of the nation's wireless users over EZ Texting's short code, prospective customers are highly unlikely to engage EZ Texting in light of its inability – caused directly by T-Mobile's unlawful blocking – to provide access to T-Mobile's millions of customers.

As the Second Circuit has explained, the "loss of ... an ongoing business representing many years of effort and the livelihood of its ... owners, constitutes irreparable harm" that cannot be fully compensated by monetary damages. *See Roso-Lino Beverage Distributors, Inc. v. Coca-*

Cola Bottling Co. of New York, Inc., 749 F.2d 124, 125-26 (2d Cir.1984); *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (“a threat to the continued existence of a business can constitute irreparable injury”). EZ Texting has been connected with T-Mobile for over three years, and is being irreparably harmed by T-Mobile’s blocking. The businesses and non-profits that use EZ Texting to send and receive text messages cannot reach T-Mobile’s customers. They will likely cease doing business with EZ Texting if they learn that EZ Texting is blocked by T-Mobile. EZ Texting’s customers will abandon EZ Texting and move to other businesses.

This claim of irreparable harm is not unduly speculative, but rather an immediate and directly foreseeable harm caused by T-Mobile’s unlawful blocking. Over the several days during which T-Mobile has maintained the blocking, EZ Texting has received numerous complaints from its customers about their inability to exchange text messages with T-Mobile’s customers. Besides the immediate harm that EZ Texting is experiencing because of T-Mobile’s blocking, EZ Texting should not have to wait until its business is destroyed to show the harm caused by T-Mobile’s blocking. Moreover, the burden on T-Mobile is extraordinarily inconsequential in comparison – all T-Mobile must do is maintain service to EZ Texting’s number to allow to allow EZ Texting’s and T-Mobile’s respective customers to communicate with each other, which is precisely what T-Mobile was doing before it started unlawfully blocking EZ Texting’s entire service.

The purpose of injunctive relief is to preserve the rights of the parties pending final disposition of their dispute. *See Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985). While T-Mobile may claim it has the right to block *all* of EZ Texting’s text messages because of some subjective concerns over the content of a single user’s messages (which contained no

illegal or objectionable content), the Court should preserve the status quo until that claim is decided. EZ Texting should not have to experience total blocking and face the destruction of its business in the face of T-Mobile's arbitrary blocking. The Court should issue a temporary restraining order enjoining T-Mobile's blocking text messages to and from EZ Texting.

B. EZ Texting has a likelihood of success on the merits of its claims.

EZ Texting has asserted several claims against T-Mobile, each of which EZ Texting is likely to establish successfully. This factor therefore also supports the Court's entry of a temporary restraining order and a preliminary injunction.

First, EZ Texting has asserted a meritorious claim under the Communications Act, 47 U.S.C. § 201, *et seq.*, regarding T-Mobile's unlawful call blocking practices. The Federal Communications Commission ("FCC") has repeatedly prohibited call blocking for any reason, and yet this is precisely the action that T-Mobile has taken against EZ Texting. *See, e.g., Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, 22 FCC Rcd 11629, 11631 ¶ 6 (2007) (reaffirming prohibition against call blocking by any carrier: "Commission precedent provides that no carriers ... may block, choke, reduce or restrict traffic in any way."); *Blocking Interstate Traffic in Iowa*, FCC 87-51, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987).¹ Thus, through its undisputed call-blocking of communications to or from EZ Texting, T-Mobile is engaged in an unjust and unreasonable practice under sections 201 and 202 of the Communications Act that the FCC has specifically forbidden carriers from doing.

Second, by blocking EZ Texting's text messages, T-Mobile has also violated the FCC's nondiscrimination policy and 47 U.S.C. § 202(a)'s prohibition against "unjust or unreasonable

¹ The FCC has held that a text message is a call. *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (affirming FCC's determination that a text message is a call for purposes of the Telephone Consumer Protection Act, 47 U.S.C. § 227).

discrimination in ... practices ... or services” and against “subject[ing] any particular person [or] class of persons ... to any undue or unreasonable prejudice or disadvantage.” 47 U.S.C. § 202(a). As the FCC and D.C. Circuit have explained, while wireless carriers may have more flexibility in pricing their services than certain classes of wireline carriers may enjoy, wireless carriers are still *common* carriers and thus subject to the same robust prohibition against unlawful customer discrimination that applies to all carriers, wireless and wireline alike. “As common carriers under [47 U.S.C.] § 332, CMRS providers still have duties. They cannot - as the [FCC] put it - refuse ‘to deal with any segment of the public whose business is the “type normally accepted.”’ [] They cannot decline ‘to serve any particular demographic group (*e.g.* customers who are of a certain race or income bracket).” *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (internal citations omitted) (quoting *Orloff v. Vodafone Airtouch Licenses LLC d/b/a Verizon Wireless*, 17 FCC Rcd. 8987, 8997, 2002 WL 992190 (2002)).

Here, it is undisputed that T-Mobile is the only wireless carrier that has blocked EZ Texting’s communications (both willing communications from T-Mobile’s own customers to EZ Texting’s customers, and from EZ Texting’s customers to T-Mobile’s customers). EZ Texting’s messages are the “type normally accepted” – and are in fact accepted – by every other wireless carrier in the country. Thus, having blocked T-Mobile’s millions of customers from communications with EZ Texting’s various customers – whether that be the local pizza shop advertising sales, a church distributing its services schedule, or a non-profit organizing its community outreach program – T-Mobile has engaged in the “unreasonable discrimination” and inflicted on EZ Texting the “unreasonable prejudice or disadvantage” that § 202(a) was specifically enacted to prevent.

- C. **Alternatively, EZ Texting has raised sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tips decidedly in EZ Texting's favor.**

At the very least, EZ Texting has raised serious questions about the legal ability of a wireless service provider, T-Mobile, to block its customers from exchanging text messages with EZ Texting's customers. Even though T-Mobile is a common carrier obligated to comply with the Telecommunications Act and the FCC's regulations regarding call blocking and nondiscrimination, T-Mobile apparently takes a novel view that it may flout its obligations and unilaterally decide what companies its customers may or may not exchange text messages with. This is a fair ground for litigation given the Telecommunications Act's prohibitions on unjust, unreasonable, and discriminatory practices. And as explained above, the balance of hardship tips decidedly in EZ Texting's favor because it is experiencing irreparable harm and faces the destruction of its business, while T-Mobile must simply do what it had been doing for the past three years, allow its customers to exchange text messages with EZ Texting's customers.

VI. CONCLUSION

For all of the foregoing reasons, EZ Texting respectfully requests that the Court grant its motion for a Temporary Restraining Order and for a Preliminary Injunction.

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